IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 14

FIBREBOARD PAPER PRODUCTS CORPORATION, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

BRIEF AMICUS CURIAE OF THE ELECTRONIC INDUSTRIES ASSOCIATION IN SUPPORT OF PETITIONER

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THE FIBREBOARD CASE

In April, 1962, the National Labor Relations Board laid down for the first time as a general proposition, that Section 8(a)(5) of the National Labor Relations Act unconditionally requires an employer to consult with his union representative before deciding to subcontract work being done by bargaining unit employees. As the Board put it,

> "In *Fibreboard Paper Products Corporation* (130 NLRB 1558), the Board held that an employer, which unilaterally subcontracts a portion of its operations for economic reasons, does not violate Section 8(a)(5) of the Act by failing to notify and negotiate with the

> representative of its employees with respect to this decision. . . . Upon reconsideration of the *Fibreboard* opinion, we are now of the view that it unduly extends the area within which an employer may curtail or eliminate entirely job opportunities for its employees without notice to them or negotiation with their bargaining representative. . . . The elimination of unit jobs albeit for economic reasons, is a matter within the statutory phrase "other terms and conditions of employment" and is a mandatory subject of collective bargaining within the meaning of Section 8(a)(5) of the Act."[1]

The Board then proceeded to reconsider the actual *Fibreboard* case referred to above, and in September, 1962, found that Fibreboard had violated Section 8(a)(5) three years before[2] by unilaterally subcontracting its maintenance work without bargaining with the charging unions over its decision to do so.[3]

Few Board decisions in recent years have evoked such controversy, or have sent Board members to the public rostrum with such frequency in defense of their policy. The Electronic Industries Association has followed closely this case, and a growing number of related cases involving the same basic issues. With each new decision, the conviction has grown that an erroneous application of the National Labor Relations Act is taking place. Accordingly, the Electronic Industries Association, in discharging its responsibility to its members, considers it most important that this Court have full opportunity to understand the reasons for adverse management reaction to the Board's decision in *Fibreboard II*.

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[1] *Town & Country Mfg. Co., Inc.*, 136 NLRB 1022 @ 1027.

[2] The 8(a)(5) charge in *Fibreboard* was filed on July 31, 1959 (130 NLRB 1558 @ 1565).

[3] *Fibreboard Paper Products Corp.*, 138 NLRB 550 (hereafter referred to as "*Fibreboard II*").

INTEREST OF THE AMICUS CURIAE

The Electronic Industries Association (herein referred to as EIA) is composed of approximately 300 member companies engaged in the manufacture of electronic equipment and components. It is the national association representing the fifth largest manufacturing industry in the United States, with gross annual sales in excess of $15 billion. The vast majority of its members deal with the Department of Defense as prime contractors, subcontractors, or both. An electronics firm acting as prime contractor for a major weapons system, awards literally thousands of subcontracts in accordance with the provisions of the Armed Services Procurement Regulations. In fact, the variety and complexity of electronic products is such that many firms are often prime contractors on one or more Government orders, while also serving as subcontractors on a number of others.

No manufacturing company—and *a fortiori,* no company in electronic manufacture—attempts to produce its products completely on its own. With the almost unlimited complexity and variety of electronic components, the degree of interdependence within the electronic industry is particularly acute. And this relationship of any particular electronic manufacturer to his suppliers, in his decisions to make or buy, is the same subcontracting relationship which the Labor Board now seeks to regulate and control in *Fibreboard II.*

A. Defense business is placed chiefly with relatively few prime contractors, who must then depend upon thousands of subcontractors in order to perform.

A recent Department of Defense report shows that defense contracts in the first instance are largely placed with a relatively small number of prime contractors. Considering all such contracts of $10,000 or more in fiscal year 1963 (July 1962 through June 1963), the report indicates that:

(1) Nearly three quarters of the total dollar value (73.9%) went to only 100 companies;

(2) Over half the defense dollars (51.9%) went to just 25 such suppliers; and

(3) Five top companies alone accounted for nearly one quarter (23.2%) of all such defense awards.[4]

This concentration occurs because of the sheer size of the prime awards, and the need for unified management direction on individual projects. *Through subcontracting,* however, substantial portions of this work are then spread out to hundreds, sometimes thousands, of participating firms. In fact the contract for a complex military and space system obviously could not be accomplished without the interlocked effort of such contractors, each producing a share, with the prime contractor to distribute, and then reassemble the combined effort.

B. Congress, in the national interest, has required and favored widespread subcontracting.

As stated by Congressman Abraham J. Multer of New York, Chairman of the Subcommittee on Government Procurement of the House of Representatives Select Committee on Small Business, at the opening of Subcommittee hearings on November 12, 1963,

> "Our Government is the largest purchaser of goods and services in the American market, and the manner in which it exercises this function profoundly affects our economy and people. It must, therefore, exercise this function with wisdom and foresight to the end that it will not capsize our free enterprise system. There is no profit in gaining the world and losing our democratic soul." (Report of Hearings, p. 3)

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[4] "100 Companies and their Subsidiary Corporations listed according to net value of military prime contract awards, fiscal year 1963," issued by Office of the Secretary of Defense. Cf. Introductory statement of Report: " . . . a substantial part of the prime contract work of companies on the 100 Company list is subcontracted to other concerns. About one-half of the military work of the large concerns is subcontracted, and over one-third of the amount subcontracted is paid to small business concerns."

Congress and the defense procurement agencies have been vigilant in assuring that the centralization of responsibility and authority obtained by using a large prime contractor does not result in unreasonable economic concentration. The national interest has also required that the production skills and economic benefits of these contracts be shared and distributed between different geographic regions, so that essential defense production does not depend upon, or benefit, merely one source or one isolated area.

Therefore, Congress has provided specifically for widespread *mandatory* subcontracting, not only within the major prime contract awards, but also at every intermediate subcontract level where severable portions of the work can be effectively distributed. The details of these Government policies, as they are affected by *Fibreboard II*, will be discussed in detail at Section IV of the Argument below. Some concept of the extent of subcontracting in defense work as a result of these policies can be obtained from the statistical table in the Appendix.

C. In Electronics manufacturing, subcontracting is an essential way of life, creating serious management problems if Fibreboard II prevails.

Products manufactured by the electronics industry unquestionably include the most advanced, complex, and sophisticated devices known to our industrial civilization. Simply in sheer number, intricate precision parts for one computer alone can be in the order of hundreds of thousands, and the incredible variety of individual parts will illustrate every conceivable industrial art from glass blowing through ceramics to machining in millionth tolerances, the vacuum densities of outer space, and metal refining to exotic degrees of purity.

Most electronics manufacturers are capable of handling special—frequently, substantial—portions of this work. No company has, or considers it feasible to have a totality of the talent or the productive capacity required for the manufacture of a complete integrated weapons system.

Every defense order for an electronic system thus represents an ultimate integration of the skills of many defense companies in and out of the electronics industry, through make-or-buy policies which affect subcontracting decisions.

Naturally, as the complexity of a product or industrial process increases, the web of such "make-or-buy" relationships markedly increases, and the impact and significance of decisions to make or to buy any particular part, component or service becomes increasingly greater.

To understand the impact of *Fibreboard II* upon the electronic industry, and particularly as affected by the Government's defense procurement procedures, it is necessary to comprehend the path of a defense order from inception through final assembly for delivery as an end item.

Complex military electronic systems are strictly "custom" made; a Defense agency invites bids and competing firms submit proposals. Even at the proposal stage, the question of subcontracting is paramount, and the bid must frequently disclose anticipated use of specific subcontractors. A typical illustration would be a bid for a radar system, in which the bidder proposed to use another electronics manufacturer for his amplifier circuit packages. The reason for such utilization could be quality, price, schedule, or all three. Although the same work could be done by the prime bidder, these or other reasons, in this instance, might dictate the utilization of an alternate outside source. Such outside source provisions are part of almost every electronic proposal of even moderate complexity.

If the contractor's bid is successful, the contract will then be awarded by the government on the condition that such amplifier packages be subcontracted in accordance with the proposal submitted. This raises several management questions:

Is *this* a subcontract which must be discussed with the bargaining representative, per *Fibreboard II*? Must it be discussed before the proposal is submitted? (Perhaps only one out of five or ten proposals will result in an actual order!) Must it be discussed after the bid is approved? (The approved bid will require that such subcontracting take place.) Clearly, an affirmative answer to either question will introduce startling new elements and concepts into defense procurement. If the potential subcontract aspects of defense proposals must be union-cleared before submission, the implications of such a requirement would not only increase the time required for bid preparation beyond reason, but also increase the cost of such bid preparation to the point of restricting the number of suppliers available to the Government.

At the level of normal decision making, after a contract has been awarded, the problems of *Fibreboard II* continue to plague.

A firm deadline for delivery, based upon national security goals, and established by the Department of Defense, is a critical element of every such contract. Schedule problems may indicate that the only sure way to achieve the timely performance required is through selective subcontracting. Must a decision to subcontract now be reviewed with the bargaining representative first? How much critical time must be lost in the debate?

And how is management to prepare for such debate? Is the union also entitled to full education on all of the factors which prompt a subcontracting decision, in order to permit such a debate to be valid? Can such an education be given in less than the time that is needed for contract fulfillment? Or can such education be given effectively in the absence of a background in manufacturing experience and decision making?

Can the union, as a trustee of *employee* interests only, be fairly asked to assume *management* responsibility in a complex of decisions where national defense, and not the immediate interests of employer *or* employee are paramount, and where the fast moving pace of decision requires, not debate, but immediate action?

These are only the immediate questions that management foresees from a literal reading of *Fibreboard II* and the later cases in which the Labor Board has carried out its new concepts of bargaining duty.

D. How the rule in Fibreboard II would affect just one aspect of manufacture, with respect to one electronic product.

The sheer volume of day-to-day make-or-buy activity in one electronics firm is far beyond the conception of even the ordinary business man. Considering the number, variety, and diversity of electronic components, a volume of over a thousand such decisions per working day in one electronics plant is not unusual. Each such decision involves precisely the type of consideration which *Fibreboard II* forcibly subjects to prior bargaining at union whim.

Leaving this larger picture, consider the requirements for one electronic product—a navigation system for a long-range submarine. This is a relatively compact unit, designed with the maximum economy of space that a submarine obviously requires. In complexity it is not to be compared even with many major airborne systems. Nevertheless, the product design for this relatively simple unit involves approximately . . .

5,000 separate engineering drawings,
530 individual sub-assemblies, and
3,300 separate parts; of which
1,300 alone are parts to be made by cutting out metal in a machine shop.

All 3,300 parts require decision to "make" or to "buy" —but to keep this illustration in simplest terms that can be readily understood without specialized electronic knowledge, consider only the 1300 metal parts that have to be machined.

In some instances, the part will be relatively simple to make in the company's own plant, but the immediate time schedule will not permit using existing facilities that are already loaded with other work having equal priority. In other cases, the part can be readily made in-plant on existing machinery, in units of one or two, but for a larger quantity, automatic machinery available only through an outside supplier may permit quantity duplication of 50 or 100 at lower cost, and with greater standardization of quality than hand production. In such case, it would not represent good value to the company, or to the government to make such a part in the plant.

Again, engineering requirements may also require unusual plating or finishing operations not economically available except through an outside specialist, so that subcontracting of at least these operations is obviously required.

Now the point about all this is that the machine shop items alone, for this *one* non-major product, require 1,300 separate decisions, and each such decision represents its own small universe of complexity, in which many variable shifting factors such as machine load and alternate availability of other processes must be evaluated against another paramount and overriding factor—getting a vital defense job done *on time* to meet the contract schedule.

Each of such 1300 machine shop decisions on this one order will affect directly the status of individual job opportunities in the plant which secured the order. To this extent, these decisions come directly within the literal terms of the Board's holding in *Fibreboard II.*

Moreover, 1300 such decisions by plant management on just one phase of a single typical order are but one segment of a total plant operation, and the decision making process is practical, not judicial. Matters are decided on the spot. Decisions are unmade and remade from day to day as the workload picture changes, as bottlenecks develop, and made with increasingly peremptory decisiveness as production deadlines approach. At times, it may be better to use a temporary idle capacity for hand-type work at least semiproductively, on parts that normally could better be made on automatic machinery. At other times, it may be better to pay high premiums for outside manufacture of one or two parts that could readily be made in the shop rather than risk disrupting existing production schedules, or take a chance of slowing down assembly lines that would be idled if the part were missing.

To act with such speed and decisiveness obviously requires many years of practical experience on the part of knowledgeable manufacturing, machining and production engineers and executives, carefully trained and screened for the task. But it leaves no time whatever for documentation or debate with union representatives. In most instances it will be totally impossible to reconstruct exact motivation at a later date, or subsequently justify in law court terms whether any individual decision to manufacture or subcontract should or should not have been made.

E. Practical absurdity of imposing the literal terms of Fibreboard II on real life.

In everyday business, these operating-level decisions to subcontract or not are made with expertise rather than formal preliminary deliberation. Primarily, they are informed *risk* decisions, the assessment of which will constantly change from day to day as a machine shop load fluctuates. Job orders first planned for shop manufacture will continually be diverted to a subcontractor and jobs

scheduled to be subcontracted will be recalled to fill vacancies in shop work load, with never-ending frequency.

In fact, a well designed manufacturing facility will maintain in-house only the machines and capacity for a reasonably predictable volume of current work. Excess plant and capacity that will be used only for peak load situations or spasmodic orders is normally avoided, and the key to successful operation lies in this precise ability to shift rapidly from in-house to subcontract and back.

Yet it is this exact situation of *peremptory* subcontracting, undebatable by its very nature, which the Labor Board language has now branded illegal if not submitted to prior discussion.

The very concept of discussion, when applied to this volume, complexity, and time pressure, is totally unreal. It is precisely the difference between driving a car, and back-seat driving.

Yet, if debate were to be required—and *Fibreboard II* has paved the way for debate at union whim—each such decision is the very grist for sharp, prolonged debate. Not one of these 1300 decisions can go one way, rather than the other, without directly expanding or contracting the job opportunities available to one skill or another in the shop.

To further compound unreality, *Fibreboard II* presupposes an area of accommodation between opposing interests where no area of agreement can honestly be expected to exist. It is simply not the union's business to adopt an employer's point of view, or to be asked to agree upon matters which have been relegated to management's responsibility under a government contract.

The union is concerned, not with the enterprise as a continuum, but only with that aspect of the enterprise

which furnishes *immediate work to those here and now employed.* The good of the firm does not become a union concern unless that good results in more work, not less, *for that particular trade or skill* which the union represents. The pressure of manufacturing deadline is a totally unpersuasive factor to the union being consulted, if the employer proposes that another firm or union will do the work to meet that deadline.

This debate is not to be compared with collective bargaining over the level of wage rates, where it is a question of more or less, not all or nothing. In wages some accommodation must be found. The employer needs the men, and the men need the jobs. In subcontracting there is little or no room for accommodation. To management it is a question of cost, of quality, and at the shop level, primarily a question of production deadlines, and of other departments waiting for the finished work. To the union, it will be all black and white, work versus no work, and *it is not the business of a union to keep a company alive at union expense.*

F. Impact on Electronic Industry as a whole.

This is merely a surface review of the obvious problems involved in just *one* phase of the manufacture of parts, for *one* electronic system of limited size, used in but *one* phase of the defense program. In relative monetary cost, it would not even be noticed among the defense purchases for a single year.

But the pattern it represents is characteristic of electronic manufacture throughout, and to understand the depth of the Electronic Industry's concern with *Fibreboard II,* these 1300 isolated decisions to make or buy on this limited phase of this one program must be multiplied by *all* the hundreds of electronic programs at each of the hundreds of firms represented by EIA.

Total factory sales of the U. S. Electronics Industry are estimated at over $15 billions annually. Of this amount,

nearly $9.5 billions are sold to the Federal Government for military and space programs.[5] These programs are at the heart of our defense effort, representing the coordinating nerve-links of communications, computation, and intelligence, without which the entire defense force could neither be mobilized nor deployed.

The question must then be asked again, how, even if *Fibreboard II* represented the understood practice of bargaining as worked out in industry and sanctioned by Congress, could such duty be fulfilled by everyday men in an everyday way without slowing the pace of decision to a crawl, or causing the expense of the defense effort to the country and its taxpayers to be magnified beyond reason?

G. Whiplash effect of Fibreboard II—a major business advantage to non-union firms.

Finally, for the first time the economic position of the union versus the non-union electronic manufacturer would become a matter of *substance* in the ability to compete.

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[5] For the fiscal year 1965, the electronic portions of the defense dollar are estimated as follows:

	Total Obligations	*Electronics Portion*	*Electronics Percentage*
Department of Defense			
Procurement (missiles, ships, planes, guns, etc.)	$14,785,000,000	$4,419,000,000	29.9%
Research and Development	6,580,000,000	2,040,000,000	31.0%
National Aeronautics & Space Administration			
Research and Development	4,365,000,000	1,450,000,000	33.2%

In addition, over 5% of nearly $28 billion for utilities, construction, operation, and maintenance, or $1,538,000,000 in fiscal '65 is also committed to electronics, making total defense electronics sales $9,447,000,000.

Source: Electronic Industries Yearbook, 1964, EIA; Conference Report, National Aeronautics & Space Administration budget, Senate-House Appropriations Committee, August 1964.

Until now such differences have been largely verbal. The non-union manufacturer in the same labor market using the same skills has been forced to pay the same or better wages than union plants for equal work. The relative level of employee benefits, area for area and plant for plant, between union and nonunion electronic manufacturers has not resulted thus far in any significant diversion of business either way.

But with the imposition of *Fibreboard II*, a wholly new factor is now introduced. Not only must an employer bargain over his wage package—he must also now bargain over the way he proposes to conduct his business, and if the union wishes, about each of his business decisions one by one as they are made.

His *reaction time*—the vital difference, so often, between economic viability and failure, is slowed to a point that will give the non-union firm a new significant edge.

This, ultimately, can only further impede the very goals for which labor is striving.

THE ISSUE

Fibreboard II Makes Illegal all Management Decisions that may Affect Working Conditions, Unless the Union has been Consulted in Advance.

This is a broad statement, but *Fibreboard II* and the later Board decisions do not permit narrower construction.[6]

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[6] It should be emphasized here that this brief and the problem to which it is addressed concerns only situations untainted by illegal or anti-union motivation. In the present case, such question is completely removed by the decisions of the Board and Court below, and by denial of certiorari by this Court on that aspect. Where the motivation can be fairly shown to be improper, the EIA takes no position in this brief.

I. The Board's order is written to cover all unilateral action.

There is, first of all, the remedial order under review in this case, which unconditionally requires that:

> "Fibreboard Paper Products Corporation, Emeryville, California, its officers, agents, successors, and assigns, shall . . . Cease and desist from . . . unilaterally subcontracting unit work or otherwise unilaterally changing the wages, hours, and other terms and conditions of employment of unit employees without prior bargaining with the above-named Unions . . . (138 NLRB 550 @ 555-556)

Board Member Rodgers (since replaced), in his *Fibreboard II* dissent, characterized this majority ruling as follows:

> "If this ruling of the majority stands, it is difficult to foresee any economic action which management will be free to take of its own volition and in its own vital interest (whether it be the discontinuance of an unprofitable line, the closing of an unnecessary facility, or the abandonment of an outmoded procedure) which would not be the subject of *mandatory* bargaining." (138 NLRB 550 @ 559-560)

The reply of the majority in no way challenged that the sweep of their ruling was this broad, but merely asserted that they were

> ". . . confident that those employers and unions who are bargaining in good faith will find it neither difficult nor inconsistent with sound business practices to include questions relating to subcontracting in their bargaining conferences." (138 NLRB 550 @ 554)

II. In other cases, the Board is applying the Fibreboard II principle as broadly as stated.

The immediate case before this Court involves subcontracting of existing work. But there is no logical reason to presuppose that the Board's order is limited to that one situation. In fact, we know it is not so limited,

from the catalog of areas in which management is being now called upon to answer to the Board for its unilateral decisions:[7]

Reference	Company	Activity
136 NLRB 1294	*Renton News*	Substitution of offset printing for letterpress printing.
137 NLRB 418	*Montgomery Ward*	Realignment of truck routes.
137 NLRB 1099	*Lori-Ann*	Going out of business.
140 NLRB 256	*Weingarten*	Sale of branch stores.
28 CA 958 (IR)[8]	*Kennecott Copper*	*Repair of a machine.
6 CA 2756 (IR)	*Westinghouse*	*Routine maintenance decisions (over 100 subcontracts or purchase orders at one plant per year).
2 CA 9619 (IR)	*Mirror*	Sale of business.
13 CA 5611 (IR)	*American Oil*	*Installation of 3 metal doors. *Removal of sludge.

* Recommended findings specifically note that no unit employees were terminated as a consequence of the unilateral action under review.

III. Unlimited definition of "terms and conditions of employment" enlarges effect of Fibreboard II still further.

A direction to refrain from "unilaterally changing . . . terms and conditions of employment of unit employees without prior bargaining"[9] thus appears to mean that management must on its own initiative consult the union first on every phase of management activity that affects employees, from the installation of fans and water coolers[10]

[7] These cases are indended to show the *scope of Fibreboard II*. In some of these cases, management has been acquitted for the present of illegal activity. Others are at intermediate levels, awaiting Board decision. But in each case, the area of management activity now subjected to specific scrutiny as a result of *Fibreboard II* is further illustrated, and management fears for the extent to which the principle of *Fibreboard II* will be applied are further justified.

[8] "IR" is a recent Intermediate Report of an NLRB Trial Examiner, released for publication by National Labor Relations Board.

[9] 138 NLRB 550 @ 556.

[10] *Sherry Manufacturing Co. Inc.*, 128 NLRB 739.

to subcontracting[11] and the substitution of new production process.[12] The alternative is a violation of Section 8(a)(5).

If this, without qualification, is the literal obligation of management (and the Board's statement of this obligation in *Fibreboard II* is totally unqualified), then every employer in every organized industrial plant is today refusing to bargain at each moment that his operation continues. Management simply cannot manage, without at every step continually affecting employees' working conditions. The normal industrial plant is a beehive of such activity. Departments are continually relocated; machinery rearranged; walls repainted; equipment replaced or repaired; washrooms refurbished, with unit impact involved at every turn.

Even the sudden opening of a window may have potential unit impact, as this very Court has recognized.[13]

On this basis, and under the Board's new rulings, it would be literally impossible to say as a matter of law that any such management action affecting employees, favorable or unfavorable, and no matter how trivial, if taken without prior consultation, does not thereby *and at that point* constitute a technical violation of Section 8(a)(5).[14]

What is more important, the power of the Board is then available to the union, under *Fibreboard II*, to restore the *status quo*, no matter how unreal.

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[11] *Fibreboard II*, supra.

[12] *Renton*, supra.

[13] See reference to "sudden drafts of heat, cold, or humidity" in footnote No. 2, *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593.

[14] In logic, such a technical violation should occur every time job opportunities are *improved* without bargaining, as well as when they are curtailed, on the same premise that a unilateral wage increase constitutes an 8(a)(5) violation. Thus under *Fibreboard II*, a decision to take on new work and increase employment should equally require prior bargaining, if NLRB is to pursue a consistent course of statutory interpretation.

We submit that this analysis leads to a situation that is equally unreal, yet is inescapable in the light of the language which the Board has used, and inescapable in the light of the specific cases following out this new pattern of interpretation.

THE ARGUMENT

In opposing the Board's rule in *Fibreboard II*, EIA is seeking to uphold established law, to assure fair and equitable administration of the National Labor Relations Act, to prevent a serious inconsistency with other Acts of Congress relating to defense supply, and to reconcile conflicting governmental policies affecting business in a manner consistent with free enterprise.

I. AN ALL-INCLUSIVE AND UNCONDITIONAL REQUIREMENT FOR PRIOR BARGAINING OVER DECISIONS AFFECTING UNIT EMPLOYEES HAS NO BASIS IN LAW.

As we have noted, the operative language in *Fibreboard II* equates the unilateral with the non-legitimate:

> "We have found that Respondent violated Section 8(a)(5) by unilaterally subcontracting maintenance work without bargaining with the Charging Unions over its decision to do so. We shall therefore order that Respondent cease and desist from unilaterally subcontracting unit work or otherwise making unilateral changes in their terms or conditions of employment without consulting their designated bargaining agent."[15]

The inescapable sweep of the Board's ruling thus encompasses, without qualification, literally every decision that management may take with reference to the operation of its business.

EIA submits that this directive is patently too broad, and contrary to both law and common sense.

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[15] *Fibreboard II*, supra, @ 554.

A. The act does not interfere with the normal rights of an employer.

After nearly 30 years of operation, the underlying statutory objective and constitutional basis for the National Labor Relations Act is no longer kept in daily sight. But that Statute was—and is—an Act for the protection of commerce, and the free flow of commerce.[16]

In 1937, the basic issue of collective bargaining v. restraint on commerce was sharper and more immediately apparent. Mr. Stanley Reed, then Solicitor General, speaking to this Court on behalf of the Board in the lead case on the constitutionality of the Statute, was careful to assure that . . .

> "We leave to the employer all the natural rights which he needs to regulate and operate his business."[17]

In administering the Statute, the 1937 Board thus clearly did not intend to create apprehension in the mind of this Court that commerce would thereby be *further* obstructed. And the decision of this Court confirmed that view:

> "The Act does not interfere with the normal exercise of the right of the Employer to select its employees or to discharge them. The Employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right to discharge when that right is exercised for other reasons than such intimidation and coercion."[18]

Thus, from the very outset, it has been recognized by this Court that the advent of the statute, and the designa-

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[16] "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred . . . " (Sec. 1)

[17] *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, appendix @ 759.

[18] *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 @ 45.

tion of a collective bargaining representative under that statute, does not of itself interfere with the normal non-discriminatory course of business decision.[19]

B. Such rights continue until modified by contract.

Accepting that there *are* employer rights[20], and that in a non-discriminatory context these rights are not diminished by the Statute, it is an easy corollary that they continue until modified by agreement:

> "...the common law right on the part of the employer to select his employees and to terminate their employment at will continues to exist except to the extent that it may be modified by the bargaining contract with the union. Instead of making this right dependent upon a provision to that effect in the contract, it is a right which an employer normally has unless it has been eliminated or modified by the contract."[21]

The statutory bargaining obligation is thus not the necessary commitment of a company to some form of co-determinism. It does not alter the pre-existent complex of rights except to the extent that agreement to modify those rights is mutually achieved.

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[19] It is not our purpose to establish here that any particular decision in a particular situation involves a "management prerogative", as much as it is to prevent enthronement of an opposite point of view, that which attempts to make *all* unilateral action affecting employees illegal unless there has been prior bargaining.

[20] Obviously, the concept of employer rights *has* real meaning: see, e.g., the definition of "Supervisor" under the Statute as one having power "responsibly to direct" employees. (Sec. 2.(11)) The Board has yet to require prior bargaining about supervisors' work orders which are at once the quintessence of unilateral decision, yet simultaneously have the most direct effect on employee working conditions. Towever, if the literal role in Fibreboard II is affirmed, mandatory prior bargaining even in this area would appear only one step away.

[21] *U.S. Steel Corp.* v. *Nichols*, 229 F. 2d 396 @ 399. See also *Shiels* v. *B & O Railroad*, 154 F. Supp. 917, and cases there cited.

C. In the absence of a contractual limitation, accepted collective bargaining practice recognizes that unilateral action is the normal and traditional mode of management operation.

The common sense of the employer-union relationship is that an employer normally does *not* consult a union about running his business, or before he makes his business decisions. Most business decisions affect employees and their jobs in one way or another. *Fibreboard II's* directive shocks because it requires *prior* bargaining on such decisions.

The clearest exposition of the rights of management in this respect is a contemporary statement by this very Court:

> "Collective Bargaining agreements regulate or restrict the exercise of management functions; they do not oust management from the performance of them. Management hires and fires, pays and promotes, supervises and plans. *All these are part of its functions, and absent a collective bargaining agreement, it may be exercised freely* except as limited by public law and the willingness of employees to work under the particular, unilaterally imposed conditions. A Collective Bargaining agreement may treat only with certain specific practices, leaving the rest to management but subject to the possibility of work stoppages." (emphasis supplied)[22]

This reassertion of fundamental and traditional legal concepts, largely overlooked in the initial management comment on *Warrior and Gulf* and its companion cases, has been given no consideration by the Labor Board. And only last term, this Court again had occasion to consider the "natural rights"[23] of employers in juxtaposition with union rights, and to state as follows:

> "Employees, and the union which represents them, ordinarily do not take part in negotiations leading to

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[22] *United Steelworkers* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574, @ 583.

[23] cf. statement of Solicitor-General Reed, supra.

> a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that *the rightful prerogative of owners independently to rearrange their business and even eliminate themselves as employers* be balanced by some protection to the employees from a sudden change in the employment relationship. The transition from one corporate organization to another will in most cases be eased and industial strife avoided if employees' claims continue to be resolved by arbitration rather than by the 'relative strength . . . of the contending forces.' *Warrior & Gulf*, supra, at 580."[24] (emphasis supplied).

Thus, deliberate phrasing of this Court's own recent decision, continues to reflect what both legal tradition and the collective bargaining practices of industry have always recognized, diametrically contrary to the concepts of *Fibreboard II*, namely, that there is in collective bargaining a sphere for proper *unilateral* management action.

D. In issuing a broad and unconditioned prohibition on unilateral management action affecting employees, contrary to common collective bargaining practice in industry, the Board is violating the express instructions of this Court.

The Labor Board is not free to fashion its mandates in a vacuum, or to impose requirements on collective bargaining that are contrary to common collective bargaining practice in industry. Ruling on an earlier Board holding that would have prevented a company from effectively bargaining for a management rights clause, this Court said:

> "Bargaining for more flexible treatment of such matters would be denied employers even though the result may be contrary to common collective bargaining

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[24] *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 @ 549.

> practice in the industry. *The Board was not empowered so to disrupt collective bargaining practices.* On the contrary, the term 'bargain collectively' as used in the Act 'has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States'."[25] (emphasis supplied).

This would seem to say in fairly plain terms that a Board result that is contrary to the common collective bargaining practice in the industry and disruptive of such existing practices cannot be sustained. But there is no real question as to what such common existing practice has been. If the two previously cited statements from current decisions of this Court[26] are insufficient to show that a body of traditional unilateral management rights exists, the Labor Board has only to look at its *own* past record, where the following cases make plain what the real tradition has been:

> No duty to bargain about plant relocation: see *Brown McLaren Mfg. Co.*, 34 NLRB 984
>
> No duty to consult union before selling, altering, or contracting out: see *Mahoning Mining Co.*, 61 NLRB 792
>
> "Sec. 8(a)(5) does not require an employer to consult with its employees' representative as a prerequisite to going out of business for nondiscriminatory reasons": see *Walter Holm & Co.*, 87 NLRB 1169

Against this background, *Fibreboard II's* unwarranted attempt to prohibit subcontracting without prior bargaining would seem totally disruptive of "common collec-

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[25] *NLRB* v. *American National Insurance Co.*, 343 U.S. 395 @ 408, citing *Telegraphers* v. *Railway Express Agency*, 321 U.S. 432 @ 346.

[26] See pp. 21-22, supra.

tive bargaining practice in industry", and thus invalid under the *American National Insurance* case just cited.

The Board majority in *Fibreboard II* showed itself quite conscious of this defect by blandly asserting in opposition that:

> "The present decision does not innovate; it merely recognizes the facts of life created by the customs and practices of employers and unions."[27]

It is difficult, if not impossible, to do justice to the degree of divergence between *this* incredible statement and the actual state of the record as set forth above. To soberly assert such a preposterous claim that *Fibreboard II* merely codifies everyday practice shows almost the mark of an Orwell. Even the one case cited by the Board in support proves the opposite claim.[28]

E. This Court has already recognized and distinguished between legitimate and illegal unilateral subcontracting.

The stated position of the Labor Board in this case is that this Court has already decided the underlying question. In directing prior bargaining about decisions to subcontract, the Board protests that its hands are tied, that it is merely carrying out this Court's mandate:

> "We do not, however, believe that the issue presented is one within the Board's discretion. In our opinion, the question is foreclosed by the Supreme Court's decision in the *Telegraphers* and other cases."[29]

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[27] 138 NLRB 550 @ 554.

[28] 138 NLRB 550 @ 554, footnote 17, citing *UAW Local 391* v. *Webster Electric Co.*, 299 F. 2d 195. The holding in Webster relied on the *contract* to support a limitation on subcontracting, thus demonstrating that in the absence of a contract no such limitation could be presumed. This is hardly the fulcrum by which to reverse an entire tradition which the Board has been directed to respect.

[29] *Fibreboard II*, 138 NLRB 550 @ 552, citing *Order of Railroad Telegraphers* v. *Chicago & Northwestern Railway Co.*, 362 U.S. 330.

The point has already and adequately been made elsewhere that *Telegraphers* is a citation wholly out of context. *Telegraphers* was an employer action for an injunction, to prevent a strike over a union demand that no jobs be abolished except by mutual agreement. The decision there was that such a union demand was *not illegal* (thereby preserving Norris-LaGuardia protection to the union).

But such a ruling in no way establishes or even suggests that management *must take the bargaining initiative* and even in the absence of the contract provision sought by the union, nevertheless consult with the union before taking action; if anything, the whole set of facts in *Telegraphers* proves again that unless there was acceptance of the union demand, the company remained free to continue unilaterally—hence the union threat of strike action. Failure of the Board to point out these key factors is not to inspire confidence in its citations.

It is true, of course, that the Board did not have available at the time of *Fibreboard II* the recent decision of this Court in *Erie Resistor*.[30] Here, the difference between proper and improper subcontracting, and the distinction created by a discriminatory context has been specifically pointed out:

> "Though the intent necessary for an unfair labor practice may be shown in different ways, proving it in one manner may have far different weight and far different consequences than in proving it in another. When specific evidence of a subjective intent to discriminate or to encourage or discourage union membership is shown, and found, many otherwise innocent or ambiguous actions which are normally incident to the conduct of a business may, without more, be converted into unfair labor practices . . . Compare *Labor Board* v. *Brown-Dunkin Co.*, 287 F. 2d 17, with *Labor Board* v. *Houston Chronicle Publishing Co.*, 211 F. 2d 848 (subcontracting union work); and *Fiss Corp.*, 43

[30] *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963).

NLRB 125, with *Jacob N. Klotz*, 13 NLRB 746 (movement of plant to another town).'"[31]

Brown-Dunkin involved employer reprisal for union activity. The company was accordingly directed to bargain over the subcontracting of maintenance work. In *Houston Chronicle*, the company unilaterally changed to an independent contractor system of newspaper distribution, refusing to bargain with respect to the former employees (cf. *Fibreboard*). The decision, cited with approval by this Court above, upheld *Houston Chronicle's* refusal—a direct contradiction of *Fibreboard II*.

We again have an illustration of how far the Board has departed from traditional and accepted concepts of bargaining. The cited passage from *Erie Resistor*, above, is clear testimony as to what was still considered the traditional point of view by the business community *and* this Court many months after the Board's decision in *Fibreboard II*.

F. Request as an essential element in the duty to bargain.

In *Fibreboard II*, the Board found a violation of Section 8(a)(5) at the point where the Company unilaterally decided to subcontract. In other words, when an employer, having made up his mind to subcontract, notifies the union in order to extend an opportunity to bargain about the effects of the decision, the illegal act is already complete; that employer has already violated the law.

To achieve this Draconian twist, the Board has had to pass over in silence the whole problem of prior request, although only a few months before *Fibreboard II* it had confirmed that

"It is well settled that a violation of Section 8(a)(5) cannot be found unless there is an appropriate request to bargain'"[32]

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[31] 373 U.S. 221 @ 227.

[32] *Lori-Ann of Miami, Inc.*, 137 NLRB 1009 @ 1113.

As recently as two years ago, this Court, in finding unilateral action by an employer illegal, was also careful to include as conditions of such a finding that:

1. The subject matter must be a subject for mandatory bargaining under Section 8(d).

2. The subject matter must be under current negotiation or a subject about which the union seeks to negotiate.

"A refusal to negotiate in fact as to any subject which is within Section 8(d), *and about which the union seeks to negotiate,* violates Section 8(a)(5) . . . We hold that an employer's unilateral change in conditions of employment *under negotiation* is similarly a violation of Section 8(a)(5) . . ."[33] (emphasis supplied)

Even in the *Timken* case—the case relied on by NLRB to date its subcontracting rule back to 1946,[34] prior request by the union to bargain on subcontracting was a critical element. The finding of the *Timken* Trial Examiner, as approved by the Board, is quite specific:

"The subcontracting of work was done pursuant to a policy adopted by the respondent prior to the advent of the bargaining representative. Hence there is no question of unilateral action taken without consultation with the union in the first instance. *The failure*

[33] *NLRB* v. *Katz,* 369 U.S. 736 @ 743. See also *NLRB* v. *Columbian Enameling & Stamping Co.,* 306 U.S. 292 @ 297: "However desirable may be the exhibition by the employer of a tolerant and conciliatory spirit in the settlement of labor disputes, we think it plain that the statute does not compel him to seek out his employees or request their participation in negotiations for purposes of collective bargaining . . ."

[34] Ignoring the wealth of contrary Board cases which established that in the absence of discriminatory considerations, there was no obligation to bargain about contracting out work, or about the closing or removal of a plant: e.g., *Brown-McLaren Mfg. Co.,* 34 NLRB 984; *Mahoning Mining Co.,* 61 NLRB 792 @ 803; *Walter Holm & Co.,* 87 NLRB 1169. Cf. citation from *Erie Resistor,* supra.

to bargain dates from Oct. 15, 1945 when the respondent replied to the union's letter of Oct. 11 on this subject."[35] (emphasis supplied)

Consequently, it must be assumed that if a specific demand from the union had *not* arisen in *Timken*, continued subcontracting by the company would be completely permissible, untainted with Section 8(a)(5) illegality, even though it was known that the amount of subcontracting then being done represented the work of 200 men.

G. Labor Board objectives underlying Fibreboard II may not have statutory sanction under the National Labor Relations Act.

Some frank discussion of underlying motivation can aid considerably in the analysis of *Fibreboard II*.

The reasons for management's attitude are obvious. Management simply sees no practical way to comply with *Fibreboard II* effectively. All management decisions have some unit impact; the most subjective and uncertain decisions, such as whether to anticipate public taste by a switch in product lines that calls for a new and different workforce,[36] may have the greatest impact. To comply with *Fibreboard II*, management must, on its own initiative, consult with the union beforehand whenever potential impact is involved. The alternative is to risk a directive—perhaps years later—restoring an outmoded status quo.

The mischief let loose by such unreal requirements, applied to the complex daily volume of electronic "make-or-

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[35] *Timken Roller Bearing Co.*, 70 NLRB 500 @ 518, footnote 19.

[36] The practical impossibility of justifying such changes to a union of employees who will lose their jobs is apparent. The employer must get out of the old product line while the market is still good, and supplies and machinery are readily disposable; he cannot plead any present economic justification whatever. Nor may he, for competitive reasons, disclose the *persuasive* details of any new activity. Yet these are precisely the classical entrepreneur decisions, the most necessary of all decisions for a flourishing competitive economy.

buy", is incalculable. Nor is the effect on everyday business practice in any industrial firm less devastating.[37]

Labor Board motivations, on the other hand, are not entirely clear. But from references by Board members in the published decisions, the outlines of several underlying objectives not sanctioned by the statute, are discernible. These include protection of the representation status of a particular union as an end in itself, social desirability,[38] and ease of administration.[39]

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[37] How the pace of business decision—which is the pace of turnover, the pace of commerce itself—can be maintained in this context is hard to conceive. The ability to risk, to ride with a turn in the market, to cut prospective losses, is bound up with the ability to act instantly and decisively. Nor are such decisions normally intellectual exercises, as much as they are instinctive trained reactions, sharpened by the success or failure of past decisions. Most are not susceptible to justification in any documented sense. The sheer weight of having to justify such action cannot but help frustrate more volatible risk taking in an organized industry. Such an effect is no service to commerce, to the pace of commerce, or to the national economy.

[38] Cf.: "Business operations may profitably continue and jobs may be preserved" (*Town & Country*, supra @ 1027).

[39] The Labor Board's task in attempting to prove a discriminatory loss of employment under Section 8(a)(3) in a subcontracting case can often require a considerable degree of effort. This is particularly true where the subcontracting situation also involves an economic motivation. However, the adoption of the rule in *Fibreboard II* has reduced the need for such proof in many cases. Subcontracting decisions made with discriminatory motivation are not likely to have been topics of prior discussion with the union. Under *Fibreboard II*, the remedy for such failure to discuss (as a refusal to bargain) is now reinstatement with back pay. Thus, under *Fibreboard II*, the *same* remedy is now available to the Board on a much simpler fact situation and without proving motive, as could have been obtained (with much more work and much less certainty of outcome) under a discrimination proceeding based on Section 8(a)(3).

Some segment of the Board obviously views the power to subcontract as the power to destroy. Cf. Member Fanning's dissent in the first *Fibreboard* case:

> "as a result of the majority's decision, employers by the simple expedient of unilaterally subcontracting work may abolish every job in a collective bargaining unit and thereby eliminate union representation".[40]

We submit that such dire predictions are both inapposite and misleading. The elimination of unit jobs is not of itself "good" *or* "bad", either in conscience, or under the National Labor Relations Act. Some jobs in present society should be eliminated as rapidly as technology permits, while preservation of jobs at one firm may well be a deprivation of work elsewhere.

Patterns of employment distribution are not the concern of the Labor Board; what properly matters to the Labor Board is *motive*. If the motive for eliminating unit jobs is anti-union or discriminatory, the statute already provides ample traditional remedy. But if such elimination is economic, and not discriminatory, then it is *not* a violation of the National Labor Relations Act and the Board has *no* power to regulate such management action.

Moreover, protection of the representative status of any particular union is not an end in itself, and the Labor Board has no power to confer such protection to the exclusion of other rights and interests. Collective bargaining is the servant of commerce, not its master. Far from granting absolute protection to union status, the National Labor Relations Act itself contains procedures for terminating such status in the interest of industrial stability. An existing union may thus have such status legally taken away, in which case the election of any union is prevented for at least a year.[41]

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[40] *Fibreboard I*, 130 NLRB 1558 @ 1564.

[41] Sec. 9 (c)(1)(A)(ii); Sec. 9.(c)(3).

Thus, such motives as preventing the elimination of union representation or unit jobs cannot in themselves become the business of the Labor Board, because they have not been made the business of the statute by Congress.

II. WITH FIBREBOARD II, THE BOARD IS SERIOUSLY MEDDLING WITH ESTABLISHED BARGAINING RELATIONSHIPS, AND HAS ENTERED UPON REGULATION OF THE SUBSTANTIVE PROVISIONS OF COLLECTIVE BARGAINING AGREEMENTS IN DIRECT VIOLATION OF THE MANDATES OF CONGRESS AND OF THIS COURT.

Although "absent a collective bargaining agreement", management functions may be "exercised freely", the fact is that under "the philosophy of bargaining as worked out in the labor movement in the United States,"[42] many labor agreements do refer to subcontracting, and in many others, silence on subcontracting is a very real part of the bargain.

It is not unusual for negotiations to open with a union demand for advance notice of future subcontracts[43]—later withdrawn in return for a more favorable wage rate. Or, some notice may be agreed to at a sacrifice in wage increases. The understanding achieved may be written or informal, and may or may not involve subcontracting arbitrability.

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[42] Cf. references at footnote 22 and 25, supra.

[43] It always having been understood, until *Fibreboard II*, that a union's subcontracting rights, if any, depended the understanding reached between the parties. Cf. Derber, Chalmers, and Edelman, *"Union Participation in Plant Decision Making"*, Industrial and Labor Relations Review, Cornell U., October 1961, pp. 83-101, @ 90: " . . . *the Board has also refrained from determining at which point in the administrative process management must discuss a decision with the union. Hence the parties are free to decide for themselves* whether management can act subject only to the union right to file a grievance after the action, whether it must give advance notice before proceeding, whether it must consult with the union before acting although not necessarily reaching an agreement, or whether it must withhold action until an agreement has been reached." (emphasis supplied)

Whatever the case, the fact remains that at one stroke, the Board now appears to have given some unions the very demand which they had willingly withdrawn for a price, and to have conferred upon others the very concessions which they had already sacrificed to obtain.

It would be fatuous to suggest that the Board, in equity, should now send these parties back to the bargaining table to undo the prices paid for the concessions now granted so freely by the Board. In the practical order it would be more in point to redirect the Board's attention to Section 8(d) of the Act, and to this Court's clear exposition of that section's requirements:

> "Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of labor agreements. Whether a contract should contain a clause fixing standards for such matters as work scheduling or should provide for more flexible treatment of such matters is an issue for determination across the bargaining table, not by the Board. If the latter approach is agreed upon, the extent of union and management participation in the administration of such matters is itself a condition of employment to be settled by bargaining."[44]

III. NLRB POLICY OF SETTING FORTH RULES OF GENERAL APPLICABILITY THROUGH DICTA IN SPECIFIC CASES HAS CONTRIBUTED TO THE DIFFICULTIES IN FIBREBOARD II.

In fashioning collective bargaining rules for the guidance of employers and unions, the National Labor Relations Board has chosen to announce such regulations through rule of decision in individual cases. The Board's rule-making authority under Section 6 of the National Labor Relations Act, and under Section 4 of the Administrative

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[44] *NLRB* v. *American National Insurance Co.*, 343 U.S. 395 @ 409.

Procedure Act[45] has been confined entirely to procedure before the Board.

The Administrative Procedure Act requires, in general, that notice of a proposed rule shall first be published in the Federal Register, and that interested persons then be given adequate opportunity to *"participate"* in such rule making through submission of written data, views, or arguments. Moreover, rules so adopted do not normally become effective for at least 30 days after final publication, providing due notice and opporunity to comply.

These salutary provisions at once insure thorough consideration and fair play application. The Agency will have the full benefit of opinion and discussion from all parties affected, and not merely the parties to the particular case selected as publication vehicle.[46] At the same time, they avoid the unfortunate connotation of *ex post facto* action which adheres to direct reversals, with penalty, of prior authoritative Board pronouncements. The unfortunate party in such case has neither notice nor opportunity to correct, and may have to pay a heavy price for

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[45] Title 5, U.S.C., ¶ 1001 et seq.

[46] Cf. the manner in which NLRB first announced reversal of Fibreboard I, and promulgated the new rule that bargaining was now required before deciding to subcontract. *Town and Country* was found to involve subcontracting to avoid union representation (136 NLRB 1022 @ 1026). The Fifth Circuit enforced on the basis of such discrimination (316 F. 2d 846). Yet in *Fibreboard II*, *Town and Country* is cited as the authority for mandatory bargaining even in the *absence of discrimination*. This is a clear instance of "the *sub rosa* formulation of rules in the guise of ad hoc decisions" which furnishes "eloquent testimony to the necessity of utilizing rule making powers for effective discharge of the Board's obligations" (see Peck, *"The Atrophied Rule Making Powers of the National Labor Relations Board."* 70 Yale Law Review 729 @ 753).

his lack of ability to discern which current Board doctrines cannot safely be relied on.

The instant *Fibreboard* case is a clear example. Lacking the benefit of public hearings and discussion as provided by the Administrative Procedure Act the Board has not only failed to define its subject matter adequately, but in fact has unwittingly fashioned a remedy far larger than the actual problem.

Even terminology becomes confused. The case under review at Intermediate Report and Board level is almost exclusively concerned with "subcontracting". In the Solicitor-General's brief to this Court re certiorari, "contracting out" is the only term. The Board is equally imprecise in indicating whether the problem to be controlled is unilateral removal of work from the unit by any means (as other current Board cases indicate) or whether the means of removal (subcontracting, sale or change in process) are equally important.

If the Board had been permitted to study the problems raised by its proposed rules in their total perspective, it might well have found that for its objectives there were adequate statutory remedies available within the framework of existing law and the traditional and recognized concepts of collective bargaining embodied in that law.[47]

The Board would also have been helped to avoid the perennial administrative temptation to regulate through touchstone "per se" criteria, more than once struck down by this Court.[48]

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[47] Cf. Resolution of the House of Delegates, American Bar Association, calling upon NLRB "to comply in the future with the rule making provisions of the Administrative Procedure Act in the area of contract bar as well as all other appropriate areas" (February 17, 1964).

[48] Cf. *American National Insurance Company*, 343 U.S. 395, reversing NLRB's rule that insistence upon any management rights clause was *per se* bad faith bargaining.

IV. THE DEFENSE PRODUCTION REQUIREMENTS APPROVED BY CONGRESS ARE INCOMPATIBLE WITH FIBREBOARD II.

A. Congressional policy on mandatory subcontracting.

The Report of the Selected Committee on Small Business, House of Representatives, issued on December 17, 1962, summarized basic Congressional intent succinctly:

> As military and weapons and equipment become more complex and sophisticated, and weapon systems procurement constitutes an ever-increasing share of military procurement; it becomes more and more difficult for small business to obtain a fair share of Government procurement. The tendency to award contracts for complete systems, rather than component parts, diminishes opportunities for small business participation as prime contractors.
>
> To meet this situation, Public Law 87-305 was enacted. This law provides that prime contracts in excess of $1 million, and subcontracts in excess of $500,000, *must* include provisions requiring prime contractors and subcontractors to conform to the small business subcontracting program. The purpose of this act is to assure greater small business participation at the subcontracting level.
>
> To implement this act, the Small Business Administration, the Department of Defense, and the General Services Administration, developed a small business subcontracting program applicable to all contracts in excess of $500,000. This subcontracting program has been incorporated into the Armed Services Procurement Regulations and the Federal Procurement Regulations.
>
> The act *requires* that "small business concerns be considered fairly as subcontractors and suppliers to contractors performing work or rendering service as prime contractors or subcontractors under Government procurement contracts."
>
> The new program insures that a prime contractor's decision to make or buy a component will not operate to the detriment of competent small business suppliers; that the Small Business Administration shall be af-

> forded an opportunity to comment and make recommendations on make-or-buy programs which would reduce anticipated small business participation; that extensive subcontracting be given consideration in evaluating bids or selecting contractors for negotiated contracts; that the Small Business Administration be afforded the opportunity to study contractors' subcontracting practices and procedures; *and that noncompliance with the requirements of the program may result in a termination for default of the prime contractor's contract.* (Report, p. 12) (emphasis supplied)

Four quotations from Public Law 87-305 further illustrate the intent of Congress with respect to subcontracting:

First, the program is mandatory:

> "Every contract for services (including but not limited to contracts for research and development, maintenance, repair and construction, but excluding contracts to be performed entirely outside the United States or its territories) in excess of $1,000,000 made by a Government department or agency, which in the opinion of the procuring agency offers substantial subcontracting possibilities, shall require the contractor to conform to the small business subcontracting program promulgated under this subsection, and to insert in all subcontracts and purchase orders in excess of $500,000 which offer substantial possibilities for further subcontracting a provision requiring the subcontractor or supplier to conform to such small business subcontracting program." (P.L. 87-305, 15 USC 637 (d) (2))

Second, a contractor's prospect of future business may depend upon effective and wholehearted compliance:

> ". . . such program shall provide that in evaluating bids or selecting contractors for negotiated contracts, the extensive use of subcontractors by a proposed contractor shall be considered a favorable factor . . ." (Sec. (d) (1))

Thirdly, however, the intent of Congress is that despite the overall objective of increased small business opportunity, the discretion of any prime contractor to award or withhold *any specific contract* is to remain completely unfettered:

> "... such program shall not authorize the Administration to:
>
> "(i) prescribe the extent to which any contractor or subcontractor shall subcontract,
>
> "(ii) specify the business concerns to which subcontractors shall be granted, or
>
> "(iii) vest in the Administration authority respecting the administration of individual prime contracts or subcontracts . . ." (Sec (d) (1))

And *finally,* the confidential and proprietary rights of each contractor are protected:

> "Nothing in this subsection shall be construed to authorize the Administrator, the Secretary of Defense, or the Administrator of General Services to secure and disseminate technical data or processes developed by any business concern at its own expense." (Sec(d)(4))

B. The applicable procurement regulations which effectuate this Congressional intent require maximum subcontracting effort from Government prime contractors.

1. "Make-or-Buy" Limitations.

A prime contractor is not at liberty to manufacture components or to supply services for the completion of his own contract when such components or services are outside his own line of business, even where he is in a position to supply such components or services without extra cost. The Armed Services Procurement Regulations (ASPR) provide, in Section 3-902.1(a), with respect to "make" portions of the contract—those which the prime contractor seeks to retain for himself:

> "(g) Proposed 'make' items shall not be agreed to when the products or services under consideration—

"(i) are not regularly manufactured or provided by the contractor, and in the opinion of the contracting officer are available—quality, quantity, delivery, and other essential factors considered—from other firms at prices no higher than if the contractor should make or provide the product or service; or

"(ii) are regularly manufactured or provided by the contractor, and are available—quality, quantity, delivery, and other essential factors considered—from other firms at prices lower than if the contractor should make or provide the product or services;

"*provided*, that such items may be agreed to, notwithstanding (i) and (ii) if in the opinion of the contracting officer the overall cost of the contract to the Government would be increased if the item were 'bought.'"

2. Small Business Considerations.

A prime contractor with the Department of Defense or its subsidiary agencies has an affirmative obligation to subcontract the maximum available to small business concerns. ASPR 1-707.2 and 3 set forth the basic requirements:

"1-707.2 Small Business Subcontracting Program. The Government's small business subcontracting program requires Government prime contractors to assume an affirmative obligation with respect to subcontracting with small business concerns. In contracts which range from $5,000 to $500,000, the contractor undertakes the obligation of accomplishing the maximum amount of small business subcontracting which is consistent with the efficient performance of the contract. This undertaking is set forth in the contract clause prescribed in 1-707.3(a). In contracts which may exceed $500,000 the contractor is required, pursuant to the clause set forth in 1-707.3(b) to undertake a number of specific responsibilities designed to assure that small business concerns are considered fairly in the subcontracting role and to impose similar responsibilities on major subcontractors. (The liaison officer required by the latter clause may also serve as liaison officer for labor surplus area matters.)

"1-707.3 Required Clauses.

(a) The "Utilization of Small Business Concerns" clause below shall be included in all contracts in amounts which may exceed $5,000 except (i) contracts which, including all subcontracts thereunder, are to be performed entirely outside the United States, its possessions, and Puerto Rico; and (ii) contracts for services which are personal in nature:

"Utilization of small business concerns (Jan. 1958)

(a) It is the policy of the Government as declared by the Congress that a fair proportion of the purchases and contracts for supplies and services for the Government be placed with small business concerns.

(b) The Contractor agrees to accomplish the maximum amount of subcontracting to small business concerns that the Contractor finds to be consistent with the efficient performance of this contract."

3. Labor Surplus Area Program.

A "labor surplus" area is a geographic area classified by the Department of Labor as an "area of substantial labor surplus" or as an "area of substantial and persistent labor surplus," depending upon the degree of unemployment that has occurred over a given period of time. The procurement regulations require prime contractors to take such designations into account, and channel subcontract work accordingly.

4. "Cost Reduction" Considerations.

Department of Defense efforts to obtain maximum value received for its purchasing dollar are currently designated as the Department's "Cost Reduction Program". As described by the agency, this forms another officially-sponsored subcontracting inducement:

"The efforts to increase the number and value of fixed-price type contracts and to improve competition at prime contract level clearly have a bearing on the sub-

> contract program. Contracts which are awarded after free and open competition with the price fixed by the bidding procedure encourage bidders to seek the most qualified subcontractors and vendors whose prices are most favorable without distinguishing between large and small.[49]

For a summary of the effect of Government policies upon the Defense program, see the table of payments to defense prime contractors, and the amounts paid out in turn to subcontractors, in the Appendix. This table shows that nearly half the defense dollar is ultimately subcontracted, and that around one third of the subcontracted dollars goes to small business firms.

C. Fibreboard II puts major Defense suppliers into areas of conflict that Congress could not have intended.

A major defense supplier, faced with need to conform to the literal mandate of *Fibreboard II,* must now resolve for himself these problems:

1. In preparing a bid, shall he consult with the union about the portions of the job he will subcontract pursuant to ASPR, *before* he gets the order? (This is the point at which effective decisions affecting unit jobs are made.)
2. A single order may involve placement with small business of several thousand separate and individual subcontracts. Each represents work which, by itself, could have been handled in the prime contractor's plants, and so given more employment security to bargaining unit members. Must each such order now be the subject of consultation before placement, at the risk of a directive from NLRB restoring *status quo* if discussion is cut off too soon? Must the employer take the initiative with respect to such consultation, or risk the same penalty?

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[49] (Report: "The Defense Small Business Subcontracting Program", Office of the Assistant Secretary of Defense)

3. Would not the *power* to consult about such individual subcontracts itself become a new trading tool, to be applied or withheld by a union in return for other concessions, thus seriously dislocating the present balance of bargaining power?

4. How can conflicting requirements to retain maximum work for a bargaining unit be reconciled with ASPR requirements of maximum subcontracting? Unless there is a *significant* price differential in favor of the small business subcontractor, the employer has no real bargaining power to support the average individual decision to subcontract per ASPR requirements. ASPR and its underlying statute *presuppose* and protect employer discretion (15 USC 637, proviso to (d) (1)) with respect to such individual decisions; the net result can only be *less* subcontracting to small business, despite the clearest expression of opposite Congressional intent.

Obviously, the rule in *Fibreboard II* was framed without the benefit of any consideration or discussion on problems like these. Such problems will, if nothing else, change the entire *pace* at which business decisions are made, with an impact on commerce as adverse as any that the Statute was enacted to prevent. When there is added to this some consideration for the enormous volume and complexity of electronics procurements and make-or-buy decision making, as previously described—none of which was taken into account when the *Fibreboard II* rule was framed by the Board—the concern of the Electronics Industry becomes even more justified and apparent.

SUMMARY AND CONCLUSION

The Electronic Industries Association respectfully submits to this Court that the rule in *Fibreboard II*—

—is contrary to established law, in that it denies to employers those normal and traditional rights to unilateral

decision, hitherto clearly acknowledged by the Congress, the Board, and this Court;

—is in direct conflict with the defense procurement policies established by Congress;

—constitutes an interference with collective bargaining which, contrary to the command of Congress and this Court, injects the Board into the substance of bargaining and seriously meddles with an established balance of power;

—finally, demands clairvoyance by every employer to discern what change in Board rules tomorrow will penalize him for yesterday's actions.

The Electronic Industries Association therefore respectfully urges that the judgment of the Court of Appeals herein be vacated and the case remanded with direction to enter judgment setting aside the Board's order.

Respectfully submitted,

ELECTRONIC INDUSTRIES ASSOCIATION

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APPENDIX

DEFENSE SUBCONTRACTING BY FISCAL YEAR, 1957 THROUGH 1963

Dollar Amounts in Millions	1957	1958	1959	1960	1961	1962	1963
1. Number of Large Contractors Reporting Their Subcontract Receipts and Payments to Department of Defense	298	294	298	298	309	378	453
2. To Small Business Concerns	$ 3,562	$ 3,242	$ 3,336	$ 3,587	$ 3,495	$ 4,011	$ 4,341
3. To Other Business Concerns	5,752	5,784	5,808	6,079	5,912	6,549	7,070
4. Total Subcontract Payments	$ 9,314	$ 9,026	$ 9,144	$ 9,666	$ 9,407	$10,560	$11,411
5. Military Contract Receipts by Reporting Contractors from Prime and Subcontract Work	$16,992	$17,479	$18,704	$19,095	$19,803	$22,337	$23,667
6. Percent of Receipts Paid Out to Subcontractors (Line 4 ÷ Line 6)	54.8%	51.6%	48.9%	50.6%	47.5%	47.3%	48.2%

SOURCE: Report: "Military Prime Contract Awards and Subcontract Payments, July-December 1963", Office of the Secretary of Defense, Table 19, p. 49.